Summary Report

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Panel Theme: Enforcing, Deterring and Prosecuting Foreign Interference Activities

Focus on Institutions and Enforcement, Not New Criminal Legislation:

The focus of the Foreign Interference Commission and of future governments should be on the effective and timely enforcement of the laws that are already on the books. Canada has admittedly tinkered substantially to improve the effectiveness of enforcement in the national security realm, particularly in the past decade or so; in so doing, the focus has largely been new laws responsive to new technologies or legal developments, new criminal offences, new (increased) investigative powers, even new institutions including, for example, the advent of the *Financial Transactions and Reports Analysis Centre of Canada* (FINTRAC) in 2000. The threat environment has become more complex, the law has become more complex in response, and as a result what is (procedurally) asked of investigators and prosecutors has become substantially more complex.

In short, Canada's responsive, whack-a-mole legislative approach to new threats and/or new legal developments—coupled with a tendency to legislate around problems with new offences and new investigative powers—has created partial fixes by way of increasingly complex procedures, without fundamental changes to the institutions most crucial in enforcing the law or protecting national security. It is time to help those mandated to protect Canada's national security by offering broader strategic guidance and a broader rethink of operations, with the goal of making the system more coherent and less complex.

Financial Crimes in the National Security Arena

Canada's primary economic sanctions tool, the *Special Economic Measures Act* (SEMA), was enacted in 1992. Since then, Canada has been criticized by its allies for unenforced sanctions-evasion activities on its soil; anecdotally, we see Canadians arrested in the United States each year for sanctions evasion activities that would seem to implicate Canadian sanctions as well. Yet, there have only ever been four sanctions prosecutions in Canada (one ongoing as of writing). Only one of these cases concerned the flow of money as opposed to

the shipment of goods; that one prosecution for financing in contravention of sanctions fell apart at the pre-trial stage, essentially for wont of evidence.[1] Put simply, that I can find we have not successfully prosecuted a single financial transaction in violation of Canada's sanctions regime(s).

Similarly, Canada created its terrorism offences in the immediate aftermath of September 11, 2001, with the primary goal of disrupting and preventing terrorist attacks from taking place; the pressure on Canada to do so, especially from the US, was particularly acute as concerns terrorist financing. In the twenty years thereafter both government reports[2] and academics[3] criticized the lack of enforcement action, including in cases that were already being prosecuted for terrorism offences and had clear financial components. Between 2001 and 2021 Canada only saw two individuals charged with terrorist financing, though since then there have been three more such charges. (By my count, over 70 individuals have been charged with terrorism offences as of writing.)

The reasons for the mismatch in Canada between contraventions, goals, and enforcements actions is of course complex. But it is also striking that in the immediate aftermath of September 11, 2001, the first legislative action in both Canada and the US pertained to terrorist financing and sanctions. Yet the United States immediately recognized the role of the dollar and economy in this endeavor, and reformed the Treasury and particularly the Office of Foreign Assets Control (OFAC) within Treasury to play a leading role on the sanctions file, while the Treasury's Financial Crimes Enforcement Network (FINCEN) was revitalized to help combat financial crime. Information sharing between agencies was then substantially revised to improve coordination and attempt to ensure synergies between actors in the field. In short, financial experts—including accountants and economists—were recruited, trained, and put on the task. In Canada, sanctions remained within the purview of diplomats at Global Affairs Canada (generalists rather than specialists by design), as had always been the case, while it was not until 2022 that GAC and the RCMP received $76 million to create a GAC sanctions bureau and the RCMP to prioritize sanctions investigations within the context of financial crimes work already being done. The hope is that money and pressure will improve results; it will—and this is crucial—but it will not change results in a fundamental way.

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[1] See *R v Kalai,* 2020 NSSC 351, online: https://www.canlii.org/en/ns/nssc/doc/2020/2020nssc351/2020nssc351.html.

[2] See for example Senate of Canada, Report of the Standing Committee on Banking, Trade and Commerce (March 2013), online: https://sencanada.ca/content/sen/Committee/411/BANC/rep/rep10mar13-e.pdf.

[3] See Jessica Davis, "Financing the Toronto 18", (2021) 44 Manitoba Law Journal 1, 197, online: https://themanitobalawjournal.com/wp-content/uploads/articles/MLJ_44.1/441_Davis.pdf.

Similarly, the RCMP has a structural and (human and monetary) resourcing problem when it comes to financial crime. (Arguably the Public Prosecution Service of Canada has similar problems, particularly when it comes to human resourcing and recruitment of talent, which should be addressed alongside RCMP reforms.) The RCMP is bifurcated between contract policing and national security policing. It is hard to see how national policing expertise is recruited, trained, and retained under the current system, with competing political demands and priorities, and a recruitment and advancement tailored to contract policing. The RCMP also needs consistent, increased financial support, with numerous recent reports identifying struggles with increased national security (and thus national policing) demands. As law professor Kent Roach has argued, "[t]inkering or leaving the RCMP to their own devices will not work. There is a need for a total overhaul of the RCMP and the RCMP Act before the next contracts with the Provinces and Territories go into force by 2032."[4] The Commission is well-placed to recommend such needed change, which needs to begin now if an answer is to be in place by 2032.

It should be noted that the creation of a Canadian Financial Crimes Agency was announced in Budget 2022, with the goal of addressing concerns about the lack of enforcement with respect to terrorist financial as well as money laundering, fraud and other financial crimes. However, no such agency currently exists and whether the Agency will come to fruition, what it will do, how it will cooperate synergistically with the RCMP, or with federal and provincial securities commissions, FINTRAC, and others, is all currently unclear.

The "Intelligence-to-Evidence Conundrum" and Canada's Bifurcated Court System

Canada's "intelligence-to-evidence" problem is extraordinarily complex—that being, to my mind, the central barrier to achieving fixes—but it is also rather easily explained in general terms: Canada collects or receives a good deal of intelligence through agencies other than policing, which is not intended to be used—or is not capable of being used—as evidence in court. So how can that intelligence either be used to support prosecutions that rely on evidence, or alternatively be shielded from disclosure obligations? This is a crucial problem to resolve because it is fundamental to virtually any national security operation—foreign interference included.

The core of the problem comes from an historic solution: the creation in 1984 of the CSIS out of the RCMP's security service. The idea was to split the intelligence gathering imperative from the arrest and disrupt powers of the RCMP, such that the RCMP was encouraged to

[4] Kent Roach, "Fixing the RCMP", (2024) 72 *Criminal Law Quarterly* 4 at 331.

collect evidence for prosecutions. Yet in 2015, CSIS was given powers to disrupt, which both made a lot of sense and also concluded (as it did again four years later when those powers were legislatively amended) without any discussion as to what that meant for the original separation of CSIS from both the RCMP and powers to act/disrupt.

What we have then seen over the years is the need to expand the powers of CSIS to add disruption authorities, coupled with persistent intelligence to evidence problems, but the broader mandate, political direction, and governing Act has largely stayed the say. Rather than continuing to tinker with the CSIS Act, it is time for a broader look at it, including precisely what the relationship between CSIS, the RCMP, and other intelligence agencies looks like, and how they can play mutually reinforcing roles.

Moreover, a good deal of the intelligence-to-evidence problem results from Canada being a "net importer" of intelligence, meaning that we receive intelligence from allies abroad, which cannot then be used in court. Blaming other countries for the problem only goes so far: it is Canada's choice not to have a foreign intelligence agency.

Finally, there have been a number of other legislative recommendations to help fix the intelligence-to-evidence problem, which have largely gone ignored in favour of amendments to the CSIS Act that give the agency new powers.[5] But in particular it is high time that Canada address its "bifurcated court system", whereby privilege claims over intelligence are litigated in Federal Court while the criminal trial goes on before a different judge in Superior Courts. The bifurcated system dates again to the early 1980s, and was created out of fear of ensuring intelligence received by Canada from foreign allies was adequately protected from open court scrutiny. In 2010, the Air India Inquiry recommended that trial court justices be authorized to make privilege (section 38) decisions to promote expeditious and fair trials; academic studies have since noted the same; and, virtually every CSIS Act consultation I have seen in the past decade has seen significant external recommendations to address the issue.

Conclusions

Improving enforcement is a complex endeavor. Too often Canada has tinkered around the edges of the problem for fear of tackling the whole of it head on, or left institutions to their own devices to suggest improvements, an approach that is usually met with a request for

[5] See Craig Forcese, "Threading the Needle: Structural Reform and Canada's Intelligence-to-Evidence Dilemma", (2019) 42 *Manitoba Law Journal* 4; Leah West, "The Problem of Relevance: Intelligence to Evidence Lessons from UK Terrorism Prosecutions", (2018) 41 *Manitoba Law Journal* 4.

more authorities to act, more funding for existing programs, more hiring, and assurances that in general everything is working well. More resources (and resourcing) is surely needed, though not necessarily for more of the same; all is not working well in the area of financial crime—which would include foreign funding of domestic interference campaigns—and, in any event, it could be working better. This problem should not be blamed on the institutions left to their own devices to request more power and resources, but in the failure to provide strategic study and direction from above, from a pan-agency perspective. It is time to take that bigger picture look at Canada's institutions, mandates, resourcing, priorities, cooperation, and how they recruit, train and retain talent.